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No. 82-375

IN THE

Supreme Court of the United States

October Term, 1982

LOUIS N. RITTEN & CO.,

Petitioner,

vs.

THE COMMISSIONER OF REVENUE,
STATE OF MINNESOTA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether under Minnesota law Petitioner, a Minnesota corporation engaged as a broker in the commodity futures business in Minneapolis, is subject to Minnesota's normal excise tax on corporate franchises imposed by Minn. Stat. § 290.02 (1971); or is subject to Minnesota's net income tax imposed only on corporations whose business "consists exclusively of . . . interstate commerce", within the meaning of Minn. Stat. § 290.03(1) (1971).

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The Respondent, Commissioner of Revenue for the State of Minnesota, respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Minnesota Supreme Court's opinion in this case. That opinion is reported at 319 N.W.2d 421.

STATUTES INVOLVED

In its petition the Petitioner neglected to set forth the Minnesota statutes actually involved in this case, the interpretation of which have up to now constituted the sole issue in this litigation.

During the taxable years in issue, Minn. Stat. § 290.02, read as follows:

> 290.02 EXCISE TAX ON CORPORATIONS; IMPOSITION, MEASUREMENT. An annual excise tax is hereby imposed upon every domestic corporation, except those included within section 290.03, for the privilege of existing as a corporation during any part of its taxable year, and upon every foreign corporation, except those included within section 290.03, for the grant to it of the privilege of transacting or for the actual transaction by it of any local business within this state during any part of its taxable year, in corporate or organized form.
>
> The tax so imposed shall be measured by such corporations' taxable net income for the taxable year for which the tax is imposed, and computed in the manner and at the rates provided in this chapter.

During the taxable years in issue, Minn. Stat. § 290.03(1), read as follows:

> 290.03 INCOME TAX; IMPOSITION, CLASSES OF TAXPAYERS. An annual tax for each taxable year, computed in the manner and at the rates hereinafter provided, is hereby imposed upon the taxable net income for such year of the following classes of taxpayers:
>
> (1) Domestic and foreign corporations not taxable under section 290.02 which own property within this state

or whose business within this state during the taxable year consists exclusively of foreign commerce, interstate commerce, or both;

Business within the state shall not be deemed to include transportation in interstate or foreign commerce, or both, by means of ships navigating within or through waters which are made international for navigation purposes by any treaty or agreement to which the United States is a party.

During the taxable years in issue Minn. Stat. § 290.08, subds. 1, 7, 8 and 13, read in relevant part as follows:

290.08 EXEMPTIONS FROM GROSS INCOME. Subdivision 1. In general. The following items shall not be included in gross income, . . .

* * * * *

Subd. 7. Interest from State or governmental subdivisions thereof. Interest upon obligations of the State of Minnesota, any of its political or governmental subdivisions, any of its municipalities, or any of its governmental agencies or instrumentalities;

Subd. 8. Interest from United States. Interest upon obligations of the United States, its possessions, its agencies, or its instrumentalities, so far as immune from state taxation under federal law; . . .

* * * * *

Subd. 13. Certain exemptions inapplicable to corporations. Subdivisions 4, 5, 10 and 11 shall not apply to corporations *and subdivisions 7 and 8 shall not apply to corporations taxable under section 290.02* or under section 290.361. (Emphasis added.)

STATEMENT OF THE CASE

This is a Minnesota state tax case which presents a question of purely state law, to wit: whether a domestic Minnesota corporation, which both the trial court and the Minnesota Supreme Court have found to be engaged in localized business activities, is nevertheless engaged in "*exclusively* . . . interstate commerce" (emphasis added) as that phrase is used in Minnesota's net income tax law, Minn. Stat. § 290.03(1).

If Petitioner's business consists of "exclusively . . . interstate commerce", its interest income from United States securities would be exempt from tax under Minn. Stat. § 290.08, subds. 8 and 13. But if it is not "exclusively . . . interstate commerce", then Petitioner is taxed under Minn. Stat. § 290.02 (the excise tax) and such interest is included in the measure of taxation.

Petitioner Louis N. Ritten & Co. (hereinafter "Ritten") is a domestic Minnesota corporation which has been engaged in business in the City of Minneapolis as a commodities futures broker since the 1920's. (A. 3).[1] During the years in question six or seven employees (corporate officers, brokers and staff) were maintained at Ritten's Minneapolis office. (*Id.*) A second office was opened in Chicago during the 1960's. (*Id.*) The facts concerning Ritten's business are essentially undisputed and were briefly described by the Minnesota Supreme Court as follows:

> Relator's futures trading involves the buying and selling of standardized contracts that specify a date and price at which a commodity will be delivered. The trading takes

[1] The abbreviation "A.——" is a reference to the Appendix contained in the Petition. The abbreviation "Pet. for Writ" refers to Ritten's Petition for Writ of Certiorari herein.

> place on the floor of an exchange, a competitive marketplace governed by rules promulgated by Congress and the federal Commodity Futures Trading Commission. A customer can have an order executed on the exchange floor by one of relator's brokers by first entering into a cash or credit transaction with relator. The credit transactions, or trades "on margin," involve depositing a downpayment with the broker, who uses the value of the futures contract as collateral for the unpaid balance. The unpaid balance or a portion thereof is subject to call by the broker in the event the commodity on the national market falls below a specified price.

(A. 3-4).

On its original Minnesota corporate tax returns for the years in issue, Ritten computed its tax under the terms of Minn. Stat. § 290.02, thereby including the interest earned from its United States securities in its Minnesota gross income. (A. 1). However, on March 17, 1976, Ritten filed claims for refund upon the basis that it should have been taxed under Minn. Stat. § 290.03, and that its interest income from United States securities should have therefore been tax exempt. (A. 2). The claims for refund were in the total amount of $15,958.26. (*Id.*)

After an administrative audit and review, including a conference with Ritten's representative, the Commissioner of Revenue found that Ritten maintained localized business activities within Minnesota, and therefore was not engaged "exclusively" in interstate commerce as required by Minn. Stat. § 290.03. The claims for refund were accordingly denied on October 2, 1979. (A. 2).

On November 30, 1979, Ritten took an appeal to the Minnesota Tax Court. Trial was held on May 14, 1980, and briefs were filed by both parties. On April 22, 1981, the Tax Court issued its Order completely affirming the Commissioner's denial of the refund claims. (A. 2).

On appeal to the Minnesota Supreme Court by writ of certiorari, Ritten continued to argue only that its business was engaged in "exclusively . . . interstate commerce" within the meaning of Minn. Stat. § 290.03(1).[3] However, the Minnesota Supreme Court upheld the Tax Court's findings of localized business activities, writing in its opinion that:

> As a representative of private persons, the broker provides access to the futures exchange, thus facilitating the flow of commodities in commerce without coming into contact with the commerce itself. This service is provided pursuant to a contractual agreement entered into when a customer walks into a broker's office. The agreement includes a commission charged for the service provided and, if the customer is trading on margin, it also establishes a credit arrangement at an agreed upon interest rate. In view of these localized activities, we cannot characterize relator's business within this state as consisting *exclusively* of interstate commerce. (Emphasis added.)

(A. 12).

The Minnesota Supreme Court thereupon affirmed the decision of the Minnesota Tax Court.

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[3] Ritten raised no argument concerning the applicability of 31 U.S.C. § 742; nor did it mention or cite the three provisions of the United States Constitution now appearing for the first time in its Petition for Writ. *See* Pet. for Writ at 1, 2-3.

REASONS FOR DENYING THE WRIT

I. THE FIRST QUESTION PRESENTED IN THE PETITION (CONCERNING 31 U.S.C. § 742) WAS NEITHER RAISED NOR DECIDED BELOW.

Petitioner Ritten asserts that the first Question Presented in this case is:

> "Whether Minnesota's income tax on interest income from U.S. government obligations violates 31 U.S.C. 742 and, therefore, the supremacy and borrowing clauses of the federal constitution."

However, this Question was neither raised nor decided in either of the state courts below. Certainly the basic pleading in this case, consisting of Ritten's Notice of Appeal to the Minnesota Tax Court, never mentioned the issue.[8] Moreover,

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[8] The allegations in Ritten's Notice of Appeal read as follows:

Under Minnesota law, every domestic corporation, except those included within Section 290.03 of the Minnesota Income & Excise Tax Act (Minn. Stat. Ann. 1976, ch. 290, sec. 290.03) is subject to an annual excise tax which taxes, among other things, interest from U. S. government obligations. (See, section 290.02 and section 290.08, subds. 8 and 13). Domestic corporations which own property within the state and whose business consists exclusively of interstate commerce are subject to an annual net income tax (section 290.03). However, these corporations are exempt from tax on interest earned on U. S. government obligations. (See, section 290.08, subds. 8 and 13). Louis N. Ritten & Co., Inc., a Minnesota corporation taxpayer, is a commodity futures brokerage house, and it contends that its business operations consist exclusively of interstate commerce, and not localized business activities. It argues that it is a domestic corporation subject to the tax provisions of section 290.03, and not section 290.02 because its operations consist exclusively of interstate commerce. Taxpayer concludes that under the annual net income tax of section 290.03 and section 290.08, its interest on U. S. government obligations is exempt from tax, and that its claims for refunds in the amount of $15,956.26 for calendar years 1972, 1973 and 1974 should have been granted.

none of Ritten's briefs or other papers filed below even cited either 31 U.S.C. § 742, or the supremacy and borrowing clauses of the United States Constitution.

A clear requirement of jurisdiction being granted under 28 U.S.C. § 1257(3), is that the validity of a state statute must have been "drawn in question" as part of the proceedings below; or that a federal title, right, privilege or immunity must have been "specially set up or claimed" as part of the proceedings below. Since Ritten failed to accomplish either of these acts with respect to its first Question Presented, there exists no ground for the granting of certiorari.

Ritten must recognize this weakness in its position because it goes on to make the claim that the Question was nevertheless "decided" by the Minnesota Supreme Court in footnote 1 of its opinion. Pet. for Writ, at 5. Of course, the Minnesota Supreme Court did no such thing. Footnote 1 of the opinion below was devoted totally to background information which was not necessary to the decision in the case. The sole reference to 31 U.S.C. § 742 in that footnote was as follows:

> The inclusion of interest on United States government obligations in computing the franchise tax, but not the income tax, is the product of federal legislation which prohibits taxation of such interest except under "nondiscriminatory franchise or other nonproperty taxes in lieu thereof imposed on corporations and except estate taxes or inheritance taxes." 31 U.S.C. § 742 (1976); *see Reuben L. Anderson-Cherne, Inc. v. Comm'r of Taxation*, 303 Minn. 124, 226 N.W.2d 611, *appeal dismissed*, 423 U.S. 886 (1975).

(A. 6-7).

This statement had nothing to do with the real grounds for the judgment below, which rested entirely upon the Minnesota Supreme Court's determination that Ritten was not engaged in "exclusively . . . interstate commerce" within the meaning of Minn. Stat. § 290.03(1). Therefore, any review by this Court of the accuracy or inaccuracy of the statement made in footnote 1 of the Minnesota Supreme Court's opinion below could only be accomplished by an advisory opinion, which this Court is of course not empowered to render. *See Herb v. Pitcairn*, 324 U.S. 117, 126 (1945).

Finally, it must be noted that Ritten's first Question Presented has essentially already been decided. In *Reuben L. Anderson-Cherne, Inc. v. Minnesota Commissioner of Taxation*, 303 Minn. 124, 226 N.W.2d 611 (1975), *appeal dismissed*, 423 U.S. 886 (1975), the Minnesota Supreme Court expressly held that Minnesota's excise tax imposed by Minn. Stat. § 290.02, is:

> [I]n fact, *a franchise tax imposed upon the privilege of operating as a corporation.* The inclusion of interest on Federal securities in determining net income of the corporation is used *only as a measuring stick to compute the amount of a franchise tax due* under Minn. St. 1971, § 290.02. As such, it is permissible under 31 USCA, § 742. (Emphasis added.)

303 Minn. at 130, 226 N.W.2d at 615.

The subsequent appeal in that case to this Court was dismissed for want of a substantial federal question. 423 U.S. 886 (1975).

Respondent is not familiar with the state laws involved in the three cases which Ritten states have been granted review

by this Court during the 1981 Term. Pet. for Writ, p. 6.[4] But whatever their merits, it is clear that Minnesota's law, at least, has already met the test of validity under 31 U.S.C. § 742. In any event, if Ritten had wanted the question to be reviewed again it should have properly raised the issue below.

II. THE REMAINING ISSUE (CONCERNING THE MEANING OF THE STATUTORY PHRASE "EXCLUSIVELY . . . INTERSTATE COMMERCE") IS PURELY A QUESTION OF STATE LAW AND THUS FAILS TO PRESENT A SUBSTANTIAL FEDERAL QUESTION.

In this lawsuit Ritten has simply failed to present a question of federal law. Although it now claims to have raised a commerce clause issue (Pet. for Writ, p. 5), Ritten's actual pleadings and subsequent arguments below never once averred that Minnesota's statutory system of taxation was in violation of the commerce clause. *See e.g.*, footnote 3, *supra*.

In fact, Ritten based its claim for refund entirely upon a reading of Minnesota statutory law. *Id.* That is the basis upon which this case was tried, and correctly so, for it is solely the Minnesota legislature's use of the phrase "*exclusively* . . . interstate commerce" (emphasis added) in Minn. Stat. § 290.-03(1), which is at issue herein.

The Minnesota Supreme Court, in its opinion below, noted that decisions of this Court are relevant and binding on the question of what is interstate commerce (A. 8); but it also correctly reserved to itself the job of interpreting what the Min-

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[4] These are: (1) No. 81-1613, *Memphis Bank & Trust Co. v. Garner*; (2) No. 81-1717, *American Bank and Trust Co. v. Dallas County*, and (3) No. 81-1834, *Bartow County Bank v. Bartow County Board of Trustees*.

nesota legislature meant when it used the key word "exclusively" in conjunction with the term "interstate commerce". That is purely a question of state law, upon which the Minnesota Supreme Court has the last word. Since Ritten chose to prosecute its appeal on the basis of Minnesota's statutory law, rather than upon any constitutional ground, it is now bound by the Minnesota Supreme Court's opinion.[5]

Ritten's further contention that the decision below has misinterpreted some of this Court's opinions (Pet. for Writ, p. 10) is undoubtedly a reference to the case of *Ozark Pipe Line Corporation v. Monier*, 266 U.S. 555 (1925). However, *Ozark Pipe Line* does not apply at all to this case, and the Minnesota Supreme Court had little difficulty in distinguishing it upon its unique facts. (A. 14-16). *Compare Ward & Leland v. Mobile County*, 209 U.S. 405 (1908) (upholding a state license tax on the cotton futures trading business because the service provided by a futures broker was local in nature and not interstate commerce for purposes of state taxation). Furthermore, *Ozark Pipe Line* did not involve the interpretation of statutory language at all. Therefore, that case has no bearing upon the present case, where the sole issue is the correct interpretation of a statutory phrase used in one of Minnesota's state laws. Because this is strictly a matter of state law, it follows that no substantial federal question exists for this Court to review.

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[5] Even if it were conceded *arguendo* that a federal question was raised in this case, it is clear that the Minnesota Supreme Court's judgment would in any event stand upon an adequate and independent nonfederal ground, to wit: its construction of the Minnesota legislature's intent in using the word "exclusively" in Minn. Stat. § 290.03(1). Thus, review would still be impermissible. *Herb v. Pitcairn*, 324 U.S. 117, 125-126 (1945).

CONCLUSION

For these reasons, the petition for a writ of certiorari herein should be denied.

Respectfully submitted,

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